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Supreme Court of the United States

October Term, 1964

LAM TAT SIN,

Petitioner,

AGAINST

P. A. ESPERDY as District Director of the Immigration and Naturalization Service, New York District,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the U. S. Court of Appeals for the Second Circuit affirming a judgment of the United States District Court for the Southern District of New York.

Jurisdiction

The judgment of the Court of Appeals was entered on July 13, 1964. Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Involved

1. May the Attorney General, who concedes that there is a moratorium on the deportation of Chinese Aliens illegally in the United States, exclude the petitioner from the

temporary relief from deportation extended to others in the same class?

2. May the Attorney General administer the moratorium on the deportation of Chinese Aliens without any rules or regulations?

3. Is the petitioner being punished by being deported merely because he originally designated the Mainland of China as a country of deportation at his deportation hearing?

The Facts

The petitioner was born on the Mainland of China. He came to the United States as a crewman in January of 1962. At the time he arrived he was married and his family resided on the Mainland of China. In May of 1962 the petitioner was afforded a hearing in deportation and as an overstayed crewman he was found deportable. His deportation was directed to the Mainland of China pursuant to his designation. Section 243(a), 8 U. S. C. A., Section 1253(a). He stated at this hearing that his designation was made so that he might see his family who then resided on the Mainland.

In May of 1962, the Attorney General halted the deportation of all Chinese Aliens, illegally present in the United States, to the Far East. This moratorium applied to all Chinese Aliens without regard to their individual circumstances, their manner of entry or the ability of the government to carry out the order of deportation. This moratorium is presently in effect and is still being followed by the respondent. The only aliens in this category who are now being deported are those who request the government to deport them. No rules or regulations were ever pub-

lished with reference to this policy nor were any criteria stated as to who is to receive the benefit of this policy.

That in October of 1963, the government advised the petitioner that he was to be deported to the Mainland of China. Thereafter the alien made an application that this deportation to the Mainland of China be withheld because he would be subject to physical persecution if he were returned to his birthplace. The petitioner's deportation order was then amended and the Mainland of China was deleted from the order. The order then read deportation first to Formosa and if not accepted into that country then to Hong Kong. The government of Formosa refused to accept the petitioner into its territory. The respondent then called upon the alien to surrender for the purpose of being deported to Hong Kong even though no other aliens similarly situated were being deported to the Far East. The instant action was then commenced in the United States District Court for the Southern District of New York on the basis that the Attorney General acted improperly in failing to follow his policy of forbearance with reference to the petitioner. The District Court (Dawson, D.J.) held that the government could deport the plaintiff and therefore granted summary judgment dismissing the complaint.

On appeal to the United States Court of Appeals for the Second Circuit the judgment was affirmed.

Why Certiorari Should Be Granted

The decision below raises important questions of law with reference to administrative procedure and more particularly the propriety of the acts of the government in their enforcement of the Immigration Laws.

I

The first question and most important one is whether the government can exclude a single alien and exclude him from the benefits of a moratorium extended indiscriminately to all other aliens in a similar category.

In May of the year 1962, the respondent halted the deportation of *all* Chinese aliens to the Far East. Whether the acts of the respondent be called a moratorium or a policy determination, in fact the practice has been followed from May of 1962 to the present time. Although no rules, regulations or [illegible]stratiye directive have been issued, there have been involuntary deportations of Chinese aliens to the Far East. The moratorium has been administered on a broad level. The facts of each case individually have not been considered. The manner of the alien's entry, marital status or length of residence in the United States has been ignored. The sole criteria was and is that the Immigration Service as a matter of policy is not deporting Chinese Aliens to the Far East. The petitioner is unquestionably a member of that class of aliens who are presently being permitted to remain in the United States.

The petitioner in his two years plus in the United States, has been employed regularly, has been a law abiding citizen and has complied with all of the lawful requests of the Immigration Service. He is not a member of the Communist party nor has he ever been a member. He is not a subversive or a narcotics violator. He is merely an overstayed crewman who has been singled out for special adverse treatment by the respondent.

The respondent must be consistent in his actions. When relief is indiscriminately granted to a group, there must be a very compelling reason for the affirmative action of the respondent with reference to one member of the group.

The petitioner has not asked for affirmative relief from the Attorney General. He has merely asked that he be treated in the same manner as are others in a similar situation. In the administration of the moratorium the Attorney General on his own initiative halted the deportation of a class of aliens. No applications had to be filed and no individual determination made. The relief was granted to all. In fact, if an alien wished to be deported he had to make a special request to the Immigration Service.

In the case at the bar, the reason offered for the deportation of the petitioner is that he chose the Mainland of China at his deportation hearing. The government further contends that the act of choosing the Mainland was an act of bad faith sufficient to justify the affirmative action of the Attorney General in singling out the appellant and physically expelling him. The mere designation of the Mainland of China, in and of itself is not an act of bad faith. The petitioner's family resides on the Mainland, and he visited there twice after he himself had left. His designation of his birthplace on the facts submitted should not have been found to be made solely for the purpose of delaying his own deportation. The government relies on the history of Section 243(a) of the Immigration and Nationality Act in the courts, in determining that the alien has acted in bad faith. The Court below gratuitously credited the petitioner with the knowledge of the history and case law with reference to the deportation of Chinese Aliens from the United States. The petitioner has been found guilty, not by his own action but by the litigation of others in the Courts.

In addition to the above, not all of the Chinese Aliens who have designated the Mainland of China are being deported. Apparently the government has sent notices to

only two or three other aliens that they are to be deported to Hong Kong. Why they have chosen those aliens, rather than others, is not clear. There are still many aliens who are deportable to the Far East and who have designated the Mainland, who are still under the moratorium. The practice of the Immigration Service in handling this type of Immigration case is significant. If an alien designates the Mainland at his hearing, he is later questioned by an officer of the Deportation Section with reference to his selection. At this time if he says he does not wish to be sent there, the proceedings are halted and no further action is taken with reference to the possible deportation of the alien. If at this interview, the alien still says that he wishes to be deported to the Mainland, it is believed that in most instances an application is made for a document to the Mainland. If a document is obtained, then in some cases the alien is called in for surrender. It is believed that the Government has received a few notices of acceptance from the Government on the Mainland of China. If there is a refusal to accept the alien for deportation from the authorities on China, then it seems that nothing further is done by the respondent. What is the bad faith that the government is concerned with? Certainly, the receipt of a document from the Mainland of China should not be considered with reference to the deportation of an alien to Hong Kong. The alien's application for withholding of deportation to China likewise should not be considered. It is interesting to note that if an alien unofficially withdraws his designation then he is considered to have purged himself and is protected by the protective shield of the moratorium. The petitioner who withdrew his designation before a Special Inquiry where his official deportation order was amended is being charged with bad faith. The petitioner's deportation order now reads the same as all aliens who are included in the mora-

torium, that is, deportation to Formosa first, and in the alternative to Hong Kong, and therefore should receive the same treatment as the other aliens who violated the same Immigration Law.

2

The petitioner is in reality being deported solely because he has designated the Mainland of China as a country of deportation at his hearing and the Immigration Service wishes to discourage others from designating their birth place by making an example of the petitioner. The alien, pursuant to Section 243 of the Immigration Act, designated the country where his family is residing to be deported to. He had a legal right to make such designation. He did no more than take advantage of a lawful right he had. However, his legal act created some difficulties for the administrative officers of the respondent and they are now getting "Even". The frustration of the enforcement minded officers of the Immigration Service is being manifested against the appellant herein. The demand by other aliens for the Immigration Service to comply with the Immigration Law by redress to the Courts apparently does not satisfy the ardor of the deportation branch of the respondent. The petitioner has been singled out for special treatment not because of anything he did himself but as a result of the difficult problems that have confronted the Immigration Service in deporting Chinese Aliens.

The respondent reluctantly concedes that there is no regulation, but says that there are no rules or regulations with reference to the administration of the general stay. The only regulation that the government contends should apply is that the Service should have the arbitrary power to determine who is to be excluded from the general policy. This administrative stay was, when instituted, applicable to all Chinese Aliens. No rules or guidelines were

stated so that individual district offices of the Service could determine if it was the intention to deport some aliens. Apparently, there was no intention to exclude any persons from the moratorium and to date there are no rules. If the Service now wishes to exclude certain persons from the general class it is imperative that rules be made. The District Director and the deportation branch of each office of the Immigration Service should not have the power to decide which alien goes and which stays.

In the instant case there is no clear statement by the respondent as to whether the petitioner is being deported for his alleged bad faith or because he designated the Mainland of China at his deportation hearing. Can the respondent, even now, state clearly and concisely which aliens are under the general stay and which are not?

That without rules and regulations or standards, chaos can result. This moratorium is coupled with a program paroling refugees from Hong Kong into the United States. The John F. Kennedy program provides for registration at the Consul, relatives in the United States, dates of filing of petitions for the refugees and some other rules. The administrative officials proceed to act orderly in their pursuant to rules and standards and a reason for the admission or rejection can be sent and stated. In the situation at the bar the administrative officials in charge of enforcing the deportations go following their own dictates. This should not be permitted.

This is not the first instance in which the government has halted the deportations of a group of aliens to a foreign country. Similarly, Cuban aliens are presently allowed to remain in the United States. Natives of the Dominican Republic were not involuntarily returned to that country when Dictator Trujillo was in power. In those situations rules and standards were applied, and the ad

ministrative officials did not make the determinations as to who would remain and who was to be deported. In the present world situation this would be intolerable.

The respondent should not be allowed to formulate rules as each case arises. They cannot be permitted to administer the present moratorium by telephone and by oral conversation. The case at the bar illustrates clearly the ramifications of such a system.

CONCLUSION

Wherefore in consideration of the magnitude of the questions presented, and in the interest of justice, it is respectfully prayed that a Writ of Certiorari issue to the United States Court of Appeals for the Second Circuit.

Dated New York, New York
August 17, 1964

Respectfully submitted,

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Opinion of United States Court of Appeals for the Second Circuit

Moore, *Circuit Judge*:

Plaintiff-appellant Lam Tat Sui brought this suit to review appellee's action in calling him to surrender for deportation to Hong Kong. He appeals from the district court's dismissal of his complaint and its award of summary judgment in favor of appellee.

Appellant, a citizen of the Republic of China on Formosa, arrived in the United States as a crewman with Hong Kong travel documents in January, 1962. He remained here beyond the period of his shore leave and in May, 1962, became the subject of deportation proceedings. At the hearing before the Special Inquiry Officer appellant did not challenge his deportability and pursuant to Section 243(a) of the Immigration and Nationality Act, 8 U. S. C. A. 1253(a),[1] he designated the mainland of China

[1] Section 243(a) of 8 U. S. C. A. 1253(a) provides in part:

"(a) The deportation of an alien in the United States provided for in this chapter or any other Act or treaty shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory unless the Attorney General in his discretion concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation nor shall any alien be given the right to withhold from designation any country contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of or has resided in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its country, such designation may thereafter be disregarded. Thereupon deportation of such alien shall

as the place to which he wished to be sent. Accordingly, the Special Inquiry Officer on May 9, 1962 ordered appellant deported to that country, but, as an alternative if deportation could not be effected there, that to the Republic of China on Formosa and as a second alternative to Hong Kong. Appellant did not appeal from this order.

On February 21, 1963, when informed by an Immigrant Inspector that it was expected that a travel document would be issued by the government on the Chinese mainland, appellant reaffirmed his original preference for deportation to the mainland. By May 6, 1963, the formal consent for the return of appellant and two other aliens had been obtained from the government on the mainland. However, when appellant was told in October, 1963 that his deportation was imminent, he moved to have the Attorney General withhold expulsion under 8 U. S. C. A. 1253(h) and to reopen the deportation proceeding alleging that he would be physically persecuted on the Chinese mainland because of his unwillingness to accept Communist rule. The Special Inquiry Officer held that appellant's application constituted a withdrawal of designation and that

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[illegible] to any country in which he is subject [illegible] country from which he entered the United States.

the application for withholding of deportation to the Chinese mainland had thus become moot. He denied the motion but resettled the order to provide for deportation to the Republic of China on Formosa, which earlier had refused to accept appellant, and in the alternative, to Hong Kong. Appellant does not challenge any aspect of the proceedings before the Special Inquiry Officer.

Appellant's argument focuses on an Executive policy determination to withhold involuntary deportations of Chinese aliens to the Far East. Appellee does not dispute the existence of the general political policy of the Attorney General of forbearance, at present, from enforcing expulsion of Chinese to Hong Kong," but urges that the Attorney General is not barred from determining that a specific class of aliens should not be beneficiaries of this "broad act of administrative grace." Appellee emphasizes that there is no statute, executive order or regulation embodying this general policy and that the policy itself does not purport to set out rigid guide lines.

The district court found that the reason for staying the deportation of aliens to Hong Kong is to lessen refugee pressure in that area of Asia, where the influx of refugees from the mainland of China is acute, and in furtherance of that goal the Attorney General need not stay all orders but may distinguish between orders on any reasonable ground. The court held that "in the course of good faith the alien exhibits in his dealings with the Government it is a [illegible] reasonable basis." We agree.

Underlying the Attorney General's determination that appellant should be removed from the United States is the history of section 243 (h) of the Immigration and Nationality Act in the courts. In *United States ex rel. Tom Mon v. Murff*, 264 F. 2d 926, 928 (3d Cir. 1959), this court held

in good faith and that he ought not to be rewarded by application of the informal general stay policy. Adoption of a policy of forbearance does not require the Attorney General to stay all deportation orders so long as the exceptions he draws are reasonable and are generally applicable. There is no proof that appellant was singled out for special adverse treatment. Upon all the facts, the Attorney General's denial was not arbitrary and without rational basis. See *United States ex rel. Kaloudis v. Shaughnessy*, 180 F. 2d 489, 490-91 (2d Cir. 1950).

Judgment affirmed.